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No.

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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1982

In Re: Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation, MDL Docket No. 150 WPG All State Cases

The States of Arizona, California, Florida, Oregon and Washington,

Petitioner,

vs.

McGraw-Hill, Inc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that a privilege for a reporter from an industry price letter regarding his sources of price information outweighs the public interest in developing evidence in a civil price fixing case brought by State Attorneys General?

PARTIES

The parties are named in the title of this petition. McGraw-Hill, Inc. owns Platt's Oilgram.

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OPINIONS BELOW

The Opinion of the Court of Appeals (2d Cir. 1982) is printed in Appendix A. The Order of the District Court is printed in Appendix B.

JURISDICTION

The Opinion of the Court of Appeals for the Second Circuit was filed and entered on May 18, 1981. This Court has jurisdiction pursuant to §1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment and the Commerce Clause of the United States Constitution, and Title 15 United States Code §1.

STATEMENT OF THE CASE

McGraw-Hill, Inc., respondent, is a third party witness in the proceedings below.

Petitioners are the States of Arizona, California, Florida, Oregon and Washington and brought suit between July 1973 and February 1977 under Clayton Act §4, (15 U.S.C. §15), against eighteen defendent major oil companies seeking to recover treble damages for retail

gasoline price fixing in violation of the Sherman Act §1, (15 U.S.C. §1). One of Petitioners' claims is that the Defendant major oil companies regularly used Platt's Oilgram Price Report (Platt's), a McGraw-Hill petroleum industry daily newsletter that publishes retail gasoline prices, to communicate price increases. The purpose and effect of this exchange of price information through Platt's was to increase retail gasoline prices.

On May 1, 1980 Petitioners noticed the deposition of Platt's. On June 11, 1980 Petitioners caused a subpoena duces tecum to be issued to Platt's out of the Southern District of New York. This subpoena duces tecum was returnable July 14, 1980.

The subpoena required Platt's to produce any documents showing, for the time period 1970 - 1973, the names of any;

> ..."persons with whom you communicated by any means for the purpose of obtaining petroleum products price information;
>
> "persons who communicated with you by any means for the purpose of furnishing to you petroleum products price information;
>
> "persons who communicated with you by telephone, teletype, or other electronic means for the purpose of obtaining from you petroleum products price information;
>
> "persons with whom you communicated by telephone, teletype, or other electronic means for the purpose of furnishing to them petroleum products price information; and
>
> "persons whom you reasonably believed had knowledge of petroleum products price information, and whose addresses or telephone numbers were kept by you."

On July 25, 1980 Platt's purported to fully comply with this subpoena by mailing to Petitioners material used by Platt's to solicit customers. Immediately following the July 25, 1980 production of documents, Petitioner's counsel informed McGraw-Hill that the production had been unsatisfactory.

On May 29, 1981 Petitioners filed a motion to compel the production of the documents in compliance with the subpoena. On July 29, 1981 McGraw-Hill filed its response.

In its response McGraw-Hill disclosed for the first time that of the five persons still employed by Platt's in July 1980, (the date for return of the subpoena) who had also been on the

Platt's staff during 1970 - 1973, only one, Mr. Bruce Chalfant, had maintained a list of his contacts in the oil industry. It was also disclosed that on February 27, 1981 (seven (7) months after the return date for the subpoena), Mr. Chalfant left the employ of Platt's and destroyed this list. McGraw-Hill's counsel and Mr. Chalfant admitted that they knew at the time the list was destroyed that it was under subpoena.

On August 24, 1981 Petitioners moved to have McGraw-Hill held in contempt of court pursuant to F.R.Civ.P. Rule 45(f) because of the willful destruction of the Chalfant oil industry contact list. Judge William P. Gray held a hearing on Petitioners' contempt motion in the Central District of California on

September 3, 1981 at which hearing McGraw-Hill was represented by counsel.

On September 21, 1981 Judge Gray entered a minute Order which commanded McGraw-Hill, Inc. to show cause why it:

> "should not be compelled to produce certain documents called for by the subpoena duces tecum issued by the United States District Court for the Southern District of New York on June 11, 1980, in connection with the deposition of Platt's Oilgram in the City of New York, N.Y. on July 14, 1980."
>
> "In addition, in the event that any of the documents subject to the aforementioned subpoena duces tecum were destroyed subsequent to the service of said subpoena, you are hereby ordered to show cause why you should not be held in contempt and punished therefor."

Immediately prior to the Show Cause hearing, which was held in New York on

December 3, 1981, McGraw-Hill made a new disclosure - yet another of its employees, Mr. Ernest McClelland, possessed a list of seven (7) oil industry contacts responsive to the subpoena duces tecum which had not been produced or even mentioned earlier. At this hearing Judge Gray ordered Mr. Chalfant, who was no longer employed by McGraw-Hill, and Mr. McClelland, who was still an employee of McGraw-Hill, to produce the information in their possession.

Mr. Chalfant, representing that his memory contained the relevant contents of the destroyed list, agreed to comply with Judge Gray's order and did, in fact, disclose to Petitioners' counsel the names of his four (4) sources contained in the destroyed document. But

Mr. McClelland on advice of McGraw-Hill's counsel expressly refused to obey the district court's Order.

Concluding that McGraw-Hill, as employer, and not Mr. McClelland, was the real party in contempt, Judge Gray so found and orally held McGraw-Hill in contempt. Subsequently on December 15, 1981 Mr. McClelland, through McGraw-Hill counsel, disclosed two (2) of his seven (7) sources.

The District Court's written contempt Order, dated January 11, 1982, was entered in the Central District of California on January 12, 1982 and in the Southern District of New York on January 27, 1982 (Appx. B). The Order imposed on McGraw-Hill a fine of $100/day,

stayed during appeal, for each day of McGraw-Hill's refusal to produce the remainder of McClelland's sources. That Order was reversed by the Court of Appeals on May 18, 1982 (Appx. A).

REASONS FOR GRANTING CERTIORARI

I. A COURT OF APPEALS SHOULD NOT BE PERMITTED TO CREATE A FIRST AMENDMENT TESTIMONIAL PRIVILEGE IN CIVIL CASES FOR REPORTERS OF AN INDUSTRY PRICE SERVICE PUBLICATION.

Branzburg v. Hayes, 408 U.S. 665 (1972) held that reporters were obligated to respond to grand jury subpoenas as other citizens do and that they must answer questions relevant to an investigation into the commission of a crime (p. 682). That decision was expressly intended to have general application. "The only testimonial privilege for

unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self incrimination." Id. at 689 and 690.

Despite the exclusivity of Constitutional privileges, the court of appeals has sought to create a reporter's testimonial privilege in civil cases which it roots in the First Amendment. In doing so, the court of appeals cites as authority its own decision in Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972) by stating:

> "The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly

> material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."

(Appx. A, p. 2678)

This holding flatly ignores the Branzburg Court's decision to eschew a conditional First Amendment testimonial privilege for reporters. Branzburg, supra pp. 702-706. The Branzburg Court specifically rejected the very tests that the Court of Appeals has adopted because of their "vagueness" and "the uncertainty attending their application." Branzburg, supra p. 703, footnote 39.

It is therefore important that certiorari be granted to halt the proliferation in the circuit courts of this "constitutional" reporter's privilege in civil cases. See also, Zerilli v.

Smith, 656 F.2d 705, 713-715 (D.C. Cir. 1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977).

II. THERE IS A CONFLICT IN THE CIRCUIT COURTS AS TO WHETHER BRANZBURG SHOULD APPLY IN CIVIL CASES.

The Court of Appeals, the Tenth Circuit Court of Appeals in Silkwood, supra and the District of Columbia Circuit in Zerilli, supra have held, as justification for imposing their three-part test for breaching the reporter's privilege, that Branzburg, supra does not apply to civil cases. Contrarily, the Ninth Circuit in Farr v. Pitchess, 522 F.2d 464 (1975) [cert. denied 427 U.S. 912 (1976)] at p. 467 stated:

> "The Branzburg Court dealt precisely with the First Amendment free press provision as it affected testimony sought to be produced before a grand jury. However, the opinion appears to teach broadly enough to be applied to other civil or criminal judicial proceedings as well."

Consequently, the Ninth Circuit has no test in civil cases other than the Branzburg one of balancing the "claimed" First Amendment privilege against the need for disclosure. Farr, supra at 468. Certiorari should be granted to resolve this conflict in the circuit courts and to decide whether or not Branzburg was intended to apply to civil cases.

III. THE PUBLIC POLICY INTEREST IN THE DISCLOSURE OF EVIDENCE RELATING TO PRICE FIXING VIOLATIONS OUTWEIGHS WHATEVER PRIVILEGE A REPORTER FOR AN INDUSTRY PRICE SERVICE USED BY COMPANIES TO FIX PRICES HAS.

The teaching of Branzburg, supra is that any First Amendment privilege claimed by a reporter must be balanced against the need for disclosure of the "privileged" information. In price fixing cases the need for disclosure is strong.

Price fixing is illegal by reason of §1 of the Sherman Act (Title 15 U.S.C. §1). The Sherman Act is the seminal, codification of our national antitrust laws. It owes its origins to the Commerce Clause of the United States Constitution. Indeed, "although this Federal interest is expressed through a statute rather than a constitutional

provision, Congress 'exercis[ed] all the power it possessed' under the Commerce Clause when it approved the Sherman Act." California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980).

Balanced against this Congressional policy are the activities of Platt's Oilgram Price Report. It is a daily petroleum industry price service which has dedicated its "corporate self" to disseminating price information. Its "reporters" and the service have been used regularly as an intermediary by those in the industry to communicate retail gasoline prices, the purpose and effect of which has been to increase and stabilize retail gasoline prices. Whatever First Amendment testimonial privilege there might be should not attach to a newsletter

that has been a facilitating device for price fixing activity.

Platt's Oilgram price service is the very same kind of "sham" newspaper that the Branzburg Court was concerned would be set up by a group engaged in unlawful activity; but which is now insulated from inquiry by the privilege that the court of appeals has created. Branzburg, supra p. 705 footnote 40.

Certiorari should be granted to decide whether or not this inquiry for the truth should occur as it does with all other citizens.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing were sent by U.S. mail postage fully prepaid on August 12, 1982 to the following:

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